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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1396

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

v.

GREYHOUND COMPUTER CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
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v.

GREYHOUND COMPUTER CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

International Business Machines Corporation ("IBM") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the court of appeals (App. A) is not reported. The memorandum, order and certification of the district court (App. B) are not reported.

JURISDICTION

The order of the court of appeals denying IBM's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) on the ground that the issue of law raised by the petition had been resolved by the Ninth Circuit in *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. Dec. 10, 1979), was entered on February 1, 1980. This Court has jurisdiction to issue the prayed-for writ under 28 U.S.C. § 1254(1) or 28 U.S.C. § 1651(a).[1]

QUESTION PRESENTED

Whether a federal district court has the authority under the Constitution to strike a jury demand in a case of such extraordinary complexity as to exceed the practical abilities and limitations of a jury.

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[1] The fact that the court of appeals has considered the merits of the question presented in denying IBM's petition to appeal, *see* p. 8, *infra*, has "brought the case within any reasonable purpose of the requirement [of 28 U.S.C. § 1254(1)] that it be *in* that court." C. Wright & A. Miller, *Federal Practice and Procedure* § 4036, at 13 (1978) (emphasis added). This Court, therefore, has jurisdiction under Section 1254(1) to issue a writ of certiorari to the court of appeals. *See, e.g., Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972). In the event this Court decides that this case was not "in" the court of appeals within the meaning of Section 1254(1), IBM moves in the alternative to invoke this Court's jurisdiction under 28 U.S.C. § 1651(a). *House v. Mayo*, 324 U.S. 42 (1945); *In re 620 Church St. Bldg. Corp.*, 299 U.S. 24 (1936); 9 *Moore's Federal Practice* ¶ 110.27, at 299 (2d ed. 1975). To that end, IBM has today filed a petition for a writ of certiorari under Section 1651(a) with an accompanying motion for leave to file.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 1254(1) (1976) provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

28 U.S.C. § 1292(b) (1976) provides:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

28 U.S.C. § 1651(a) (1976) provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall be . . . deprived of . . . property, without due process of law . . . ."

The Seventh Amendment to the United States Constitution provides in relevant part:

> "In Suits at common law . . . the right of trial by jury shall be preserved . . . ."

Rule 39(a)(2) of the Federal Rules of Civil Procedure provides in relevant part:

> "When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless . . . the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

STATEMENT

This petition arises out of a ruling preceding the second trial of an action commenced by Greyhound Computer Corporation ("Greyhound") against IBM under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), alleging violations of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976). Including the first trial in this case, the upcoming trial will be the seventh trial of a private Section 2 damage action against IBM, all arising out of the same general time period and all involving many similar claims, issues and facts. Three of these cases—*Memorex*, *Transamerica* and *Forro*—reached juries after lengthy

trials.[2] In all three, the juries hung on the antitrust issues.[3]

The first *Greyhound* trial was a protracted, complex proceeding. At issue were a variety of claims based on IBM's products and pricing and involving complicated concepts of accounting, finance, market economics and computer technology. Plaintiff's case required 25 trial days. Two hundred sixty-nine exhibits were introduced into evidence, and 20 witnesses testified. The trial transcript ran to some 4,100 pages. At the close of plaintiff's case, the trial judge directed a verdict for IBM. [1972] Trade Cas. ¶ 74,205 (D. Ariz. 1972). The judgment for IBM was subsequently reversed in part and remanded for a new trial of most of the Section 2 claims. 559 F.2d

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[2] Two of the actions, including the first *Greyhound* trial, resulted in a directed verdict at the close of plaintiff's case. *California Computer Products, Inc. v. IBM Corp.*, [1979-1] Trade Cas. ¶ 62,713 (9th Cir. June 21, 1979) (58 trial days) (directed verdict affirmed). The one bench trial was *Telex Corp. v. IBM Corp.*, 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd in part*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). The antitrust claims in *Telex* were tried together with a trade secret counterclaim in 30 days. The district court decided against IBM on the antitrust claim and for IBM on the trade secret claim. The Tenth Circuit reversed the antitrust decision and directed the entry of judgment for IBM; it affirmed the judgment for IBM on the trade secret claim.

[3] *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978), *appeal pending sub nom. Memorex Corp. v. IBM Corp.*, Nos. 78-3050, 78-3236 (9th Cir., docketed Sept. 12 and Oct. 6, 1978) (*"Memorex"*) (96 trial days); *Transamerica Computer Co. v. IBM Corp.*, [1979-2] Trade Cas. ¶ 62,689 (N.D. Cal. Oct. 18, 1979), *appeal docketed*, No. 80-4048 (9th Cir. Jan. 31, 1980) (123 days); *Forro Precision, Inc. v. IBM Corp.*, Civ. No. 74-1653 (N.D. Cal. 1977), *appeal pending*, Nos. 78-1455, 78-1755 (9th Cir., docketed Mar. 1 and Apr. 7, 1978) (22 trial days).

488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). The second trial is now scheduled to begin on May 1, 1980.

The second *Greyhound* trial will almost certainly involve even more complex issues than the first. All but two of the issues presented in the first trial are again to be contested. In addition, Greyhound is pressing new claims based on IBM's products and pricing since 1972 and now alleges anticompetitive conduct in dozens of markets and submarkets—not just the two or three at issue in the first trial. The case also now covers an additional seven years of allegedly anticompetitive conduct.[4] The district court judge has concluded that this is a "complex case by any definition." App. B. He has estimated conservatively that it will take as long as four months to try Greyhound's claims to a jury. *Id.*

Because a jury cannot reasonably be expected to understand and fairly decide so protracted and complex a case—as the *Memorex*, *Transamerica* and *Forro* cases have vividly demonstrated—IBM moved, pursuant to Fed. R. Civ. P. 39(a), to strike Greyhound's jury trial demand. IBM argued, first, that the Seventh Amendment does not preserve a right to a jury trial in cases too complicated to be understood by a jury and, second, that the Due Process Clause does not permit the use in the federal courts of an

[4] The greatly expanded scope and complexity of the second trial is reflected in the extensiveness of Greyhound's pre-trial discovery. Greyhound has deposed 73 IBM employees—over 5 times the number of IBM employee depositions taken in preparation for the first trial. And IBM has this time produced well over 10 times the approximately 150,000 pages of documents discovered by Greyhound for the first trial.

adjudicatory procedure incapable of yielding a reasoned result.

The district court agreed that the *Greyhound* case "involves sophisticated, highly technical and difficult questions of economics, technology and law" and acknowledged "the real danger of a hung jury." App. B. Nevertheless, the district court concluded that under its view of the "current status of the law," *id.*, it lacked the authority to grant IBM's motion to strike. At the same time, the court acknowledged that the lower courts are "not unanimous" on the issue raised by IBM's motion, and it therefore certified the question of jury trials in complex cases to the Ninth Circuit pursuant to 28 U.S.C. § 1292(b). *Id.*

While IBM's petition for permission to appeal was pending, the Ninth Circuit announced its decision in *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. Dec. 10, 1979). That case involved an appeal from an order entered by the trial judge striking a plaintiff's jury trial demand on the ground that the case was too complex to be understood by the jury. In reversing the trial judge, the Ninth Circuit, one judge dissenting, held there is no "'complexity' exception to the Seventh Amendment right to a jury trial in civil cases." *Id.* at 413. The majority reasoned that the Seventh Amendment preserves a right to a jury in a damage action asserting traditional common law claims, regardless of the complexity of the issues involved or their suitability for resolution through the jury procedure. The majority also rejected a due process challenge to the use of juries in complex cases, basing its decision on its

belief that complexity can be minimized through various pre-trial and trial procedures and that, regardless of the ultimate complexity of the issues, "a jury *is* a competent fact finder in complex cases." *Id.* at 427 (emphasis in original).

In reaching this result, the *U.S. Financial* majority made clear that its decision did not turn on the degree of complexity involved in the *U.S. Financial* trial. Indeed, the majority opinion declared that "differing degrees of difficulty and complexity would not alter [its] ultimate decision." *Id.* at 416. In dissent, Judge Kilkenny observed that a jury trial of the complicated issues involved in the *U.S. Financial* case "would result in nothing short of judicial chaos" and that the opinion of Judge Turrentine, the trial judge, " 'covers the waterfront' and adequately responds to every proposal of the majority. *In re U.S. Financial Securities Litigation*, 75 F.R.D. 702 (1977)." *Id.* at 432.

By an order entered on February 1, 1980, the Ninth Circuit, per Judges Hug and Pregerson, rejected IBM's petition for permission to appeal. In so doing, the court made clear that it had considered the merits of the IBM petition and had found the certified question to be controlled by its recent pronouncements in *U.S. Financial.* The court ruled: "The issue of law raised by the petition has been definitively resolved in this circuit, *In re United States Financial Securities Litigation* . . . ." App. A.[5]

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[5] A petition for a writ of certiorari to review the *In re U.S. Financial Securities Litigation* decision has been filed with the Court and is captioned *Gant v. Union Bank.* IBM has moved for leave to file a brief as amicus curiae in support of petitioner Gant.

REASONS FOR GRANTING THE WRIT

This case raises an issue of unusual importance for the administration of justice in the federal courts. The question presented is whether the Constitution denies a federal district court judge the power to withhold a civil case from a jury and decide it himself when the judge is convinced that a jury cannot reasonably be expected to understand and accurately decide the extraordinarily complex issues involved. Relying on its recent decision in *U.S. Financial,* the Ninth Circuit has ruled that the extraordinary complexity of the upcoming second *Greyhound* trial cannot serve as a basis for striking plaintiff Greyhound's jury trial demand. The Ninth Circuit's decisions in both the instant case and in *U.S. Financial* are wrong, inconsistent with the teachings of this Court, and in conflict with the decisions of other federal courts concerning the standards to be applied in resolving Seventh Amendment jury trial questions. Unless reversed, the Ninth Circuit's ruling will perpetuate the increasing abuse of jury trial procedures that has resulted in avoidable burdens on the federal courts and in litigants being deprived of fair and reasoned adjudications of complex disputes.

I. This Petition Raises an Issue of Unusual Importance That Has Produced a Widespread Conflict of Views in the Lower Federal Courts.

There can be no serious question about the importance of the issue raised by this petition. At issue here is the adequacy of the jury trial procedure to reach fair and reasoned results in extraordinarily complex cases. Whether jury trial is a constitutionally mandated procedure in cases of such extraordinary

complexity as to exceed the practical abilities and limitations of juries is, as the Ninth Circuit so aptly observed, a question that "strikes at the heart of this country's system of jurisprudence." 609 F.2d at 413.

The Ninth Circuit's rulings in *Greyhound* and *U.S. Financial* have heightened the already widespread conflict among the federal courts concerning the standards to be applied in resolving Seventh Amendment jury trial questions. The Ninth Circuit is, to be sure, the first court of appeals to decide squarely whether the complexity of a lawsuit is of itself a constitutionally sufficient basis to strike a jury demand. The Ninth Circuit's rulings are, however, in direct conflict with at least four district court opinions. And the Ninth Circuit's refusal to allow trial courts to consider the complexity of a case, in ruling on a motion under Fed. R. Civ. P. 39(a)(2) to strike a jury demand, is directly contrary to the approach to Seventh Amendment questions that has been adopted by six other courts of appeals.

In concluding that the ability of a jury to comprehend a case of extraordinary complexity is not relevant to Seventh Amendment analysis, the Ninth Circuit refused to follow the test set forth in *Ross v. Bernhard*, 396 U.S. 531, 538 (1970). In *Ross*, this Court identified three factors to be used in determining whether the Seventh Amendment preserves a right to jury trial of a particular claim: "As our cases indicate, the 'legal' nature of an issue is determined by considering first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, *the practical abilities and limitations of juries.*" *Id.* at 538 n.10 (emphasis added).

Reasoning that the third factor of the *Ross* test is a "radical departure" that does not state "a rule of constitutional dimensions," the Ninth Circuit declined the "invitation" to engage in the inquiry called for by *Ross*. 609 F.2d at 425.

The Ninth Circuit's decision cannot be reconciled with four district court opinions that have found the third factor of the *Ross* test dispositive of the question of the right to jury trial in extraordinarily complex cases. *Rosen v. Dick*, 83 F.R.D. 540 (S.D. N.Y. 1979), *interlocutory appeal docketed*, No. 79-7844 (2d Cir. Nov. 27, 1979); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *ILC Peripherals Leasing Corp. v. IBM Corp.*, *supra*; *In re Boise Cascade Securities Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976).[6]

Nor can the Ninth Circuit's holding that the Seventh Amendment does not require an inquiry into "the practical abilities and limitations of a jury" be reconciled with the approach to Seventh Amendment questions that has been adopted by other courts of appeals. In *Rogers v. Loether*, 476 F.2d 1110 (7th Cir. 1972), *aff'd sub nom. Curtis v. Loether*, 415 U.S. 189 (1974), for example, the court, speaking through then Circuit Judge Stevens, described the *Ross* opinion as follows:

> "[T]he Court identified history as only one of three criteria that should be considered in de-

[6] Two district court opinions support the Ninth Circuit's result. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889 (E.D. Pa. 1979), *appeal pending*, No. 79-2540 (3d Cir., argued Feb. 14, 1980); *Transamerica Computer Co. v. IBM Corp.*, 459 F. Supp. 626, 629 (N.D. Cal. 1978).

> termining the 'legal' nature of an issue. The other two were: 'second, the remedy sought; and, third, the practical abilities and limitations of juries.' Indeed, not only did the Court identify these two additional criteria; it also implied, without expressly stating, that history may be a less reliable guide than the other two." *Id.* at 1118 (footnotes omitted).

A similar view of the *Ross* test has been adopted by other courts of appeals that have conducted a "complexity" inquiry into relatively non-complex lawsuits in the course of upholding (or, in one case,[7] in denying) a jury trial. *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138, 143 (5th Cir. 1979); *United States v. Anderson*, 584 F.2d 369, 373 (10th Cir. 1978); *Pons v. Lorillard*, 549 F.2d 950, 953 (4th Cir. 1977), *aff'd on other grounds*, 434 U.S. 575 (1978); *Minnis v. International Union, UAW*, 531 F.2d 850, 852 (8th Cir. 1975). *But see Tights, Inc. v. Stanley*, 441 F.2d 336 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971).

The conflict created by the Ninth Circuit's rulings constitutes a sufficient basis for granting review. In *Curtis v. Loether*, 415 U.S. 189 (1974), this Court granted certiorari to review a Seventh Amendment issue that arose in the context of a remarkably similar split of authority. At issue in *Curtis* was whether the Seventh Amendment entitles a party to demand a jury trial to redress violations of Title VIII of the Civil Rights Act. The Court granted certiorari

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[7] *Hyde Properties v. McCoy*, 507 F.2d 301, 306 (6th Cir. 1974). *See also Hildebrand v. Board of Trustees*, 607 F.2d 705, 708 n.3 (6th Cir. 1979).

"[i]n view of the importance of the jury trial issue in the administration and enforcement of Title VIII and the diversity of views in the lower courts on the question." *Id.* at 191. That "diversity of views," the Court went on to explain, consisted of the court of appeals opinion and a split of authority among the four district courts (including the district court in *Curtis*) that had addressed the issue: "The Seventh Circuit here was the first court of appeals to consider the issue, but the reported decisions of the district courts are evenly divided on the question." *Id.* at 191 n.2. The instant petition involves a jury trial question of at least equal importance and arises in the context of an even more widespread conflict among the courts.

II. The Question of Jury Trials in Complex Cases Should Be Considered by this Court with both the *U.S. Financial* Case and the Instant Case Before It.

While the Ninth Circuit applied the same misconceived constitutional analysis to the jury trial question in both *Greyhound* and *U.S. Financial*, the two cases present instructively different variations on the theme of extraordinary complexity. The complexity of *U.S. Financial* is, at least to some degree, a by-product of the joinder of many parties and the consolidation of many claims into one proceeding. *Greyhound*, in contrast, is basically a single dispute between two parties. The complicated nature of the suit arises solely out of the extraordinary complexity of the factual and legal issues involved. As the district court found, based on the record made in the pretrial proceedings and in the first trial, *Greyhound* presents "sophisticated, highly technical and difficult questions of economics, technology and law." App. B.

The district court's conclusion as to the substantive complexity of *Greyhound* is buttressed by IBM's experience in other Section 2 cases brought against it. The *Memorex* case, for example, raised Section 2 claims of marked similarity to those here involved. The trial lasted 96 days and involved 83 witnesses, including 17 experts, and 2,300 exhibits. After 19 fruitless days of jury deliberations, following instructions from the judge running to 83 pages, the *Memorex* foreman confessed the jury's inadequacy to the task they had been assigned, stating:

> "If you could find a jury that's both a computer technician, a lawyer, an economist, knows all that stuff, yes, I think you could have a qualified jury, but we don't know anything about that." [8]

The jury that heard the *Memorex* case, though "conscientious and diligent," 458 F. Supp. at 447, obviously did not understand the issues, as the trial judge found.[9] *Id.* at 448.

This Court should have before it the different kinds of complexity presented by *Greyhound* and *U.S. Financial* when it considers the applicability of the Seventh Amendment to extraordinarily complex litigation. The variations presented by the two cases will assist the Court in analyzing the constitutional

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[8] *Memorex*, 104 Tr. 19,547-48.

[9] A more extended account of the *Memorex* jury's failure to understand that case is contained in Appendix A to IBM's amicus brief in support of the petition for certiorari filed in the *U.S. Financial* case. *See* note 5 *supra*.

issues in the concrete factual context of two major pieces of litigation under the antitrust and securities laws. Moreover, should the Court wish to enunciate standards to guide trial courts in the exercise of their authority to withhold extraordinarily complex cases from juries, *cf. Barker v. Wingo*, 407 U.S. 514 (1972), having both *Greyhound* and *U.S. Financial* before it would aid the Court in formulating generally applicable standards. Such standards should, of course, be based upon the principal factors that cause certain kinds of cases to exceed the practical abilities and limitations of juries. Taken together, the *Greyhound* and *U.S. Financial* proceedings provide a broader basis for identifying those factors than *U.S. Financial* does by itself.

III. The Ninth Circuit's View That the Complexity of a Case Is Irrelevant to Whether It Is Triable as of Right to a Jury Is Historically Wrong and Is Contrary to Established Constitutional Principles.

In *U.S. Financial*, the Ninth Circuit concluded that the extraordinary complexity of a case can never serve as a basis for striking a jury trial demand. In so concluding, the court has effectively deprived many litigants in the Ninth Circuit of their right to a fair and reasoned adjudication of disputes in extraordinarily complex cases. The court offered three justifications in support of this far-reaching determination. Each, we submit, is without foundation.

(1) The Ninth Circuit concluded that the trial of extraordinarily complex issues to a jury does not violate the right to due process under the Fifth Amendment. In reaching this decision, the court did not—

and indeed could not—dispute the contention that a litigant has a due process right to a decisionmaking procedure that will promote accurate decisions. Just last term, in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), this Court reaffirmed the principle that the Due Process Clause requires, *inter alia*, consideration of "the risk of an erroneous deprivation of [a private] . . . interest through the procedures used." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The accuracy that due process is intended to promote can be reliably achieved in an adjudicatory proceeding only if decisions are based on an understanding of the evidence and applicable law. A jury that is not capable of understanding the issues involved in a lawsuit is manifestly unsuited to perform such a decisionmaking role.

The Ninth Circuit based its due process ruling on a generalized, unsubstantiated assumption that juries are capable of comprehending and fairly resolving all cases, however complex the issues or protracted the trial. Without analysis, the court declared that "experience demonstrates that juries are capable of sorting out complex factual issues and applying the law to them." 609 F.2d at 431. That unsupported conclusion is belied by IBM's experience in litigating, in the Ninth Circuit, complex issues such as those involved in *Greyhound* and does not constitute an adequate inquiry into the due process questions raised by use of the jury trial procedure in this case.

(2) The Ninth Circuit reasoned that the appropriate mode of Seventh Amendment analysis is the

"historical test"—a mode of analysis, traditionally applied by the federal courts, that examines the scope of common law jurisdiction at the time of the adoption of the Seventh Amendment in 1791. The court concluded that a case, however complex, must be deemed to be "a suit at common law"—and hence covered by the Seventh Amendment—if the claim is based on common law principles and damages are being sought. 609 F.2d at 421. That historical analysis is simply incorrect.

Historically, issues as complex as those involved in the *Greyhound* case would have been tried in equity to a court, not "at law" to a jury. A research Note prepared at the request of IBM's counsel by the Right Honorable Lord Devlin, a Lord of Appeal of England and a leading authority on the role of the jury in English law, decisively refutes the Ninth Circuit's conclusion that equity would not assume jurisdiction over a complex claim for damages founded on common law principles.

Equity took jurisdiction of a case, even a case pending in a law court, whenever the procedures of the law court were deemed to be inadequate and the law court was being made an instrument of injustice. As Lord Devlin shows, one reason that a law court might be procedurally inadequate, and thus fail to do justice, was its reliance on the jury to decide disputed questions of fact. The Chancellor, desiring to avoid injustice, did not permit litigants to submit to the common law courts complex cases unsuited to jury trial procedures. After tracing the various ways in which the Chancellor controlled the disposition of complex cases or issues, Lord Devlin concludes:

> "The cases, read as a whole, show that the Chancellors of the period had formed a very clear idea of what the juries of the period could and could not do adequately; and that they would not have allowed to proceed at common law any case which they considered to be above the level of the jury of the time." [10]

(3) The Ninth Circuit committed a fundamental error in concluding that this Court's reference in *Ross* to the "practical abilities and limitations of juries" was "a radical departure" from established Seventh Amendment doctrine. 609 F.2d at 425. Rather, that reference was merely a reformulation of a well established equitable doctrine that has been incorporated by this Court into Seventh Amendment analysis—equity must act when legal remedies or procedures are inadequate.

In a line of cases, beginning with *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), this Court has increasingly defined the scope of the Seventh Amendment by making adequacy of legal remedy—specifically adequacy of jury trial procedures—the dividing line between what must be tried "at law" to a jury and what may be tried in equity to the court. *See also Katchen v. Landy*, 382 U.S. 323 (1966); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). By considering the adequacy or practicality of trying the claim or issue "at law" to a jury, this Court has been able to apply the Amendment functionally to

[10] P. Devlin, *Note on the Suit at Common Law in England at the Time of the Seventh Amendment (1791)* ¶ 105 (Dec. 1979). Lord Devlin's Note, currently available as a privately published monograph, has been accepted for publication in a forthcoming issue of the Columbia Law Review.

preserve the jury trial right in cases where that mode of trial is feasible and, at the same time, to remove from jury resolution those cases or issues in which a jury trial would not contribute to "a fair and orderly adjudication of the controversy." *Beacon Theatres, Inc. v. Westover*, 359 U.S. at 507.[11]

This mode of Seventh Amendment analysis was merely given its most explicit statement in *Ross v. Bernhard*, and the reference in *Ross* to "the practical abilities and limitations of juries" simply reflects what prior Seventh Amendment decisions and historical English practice make clear: The capacity of a jury to decide a case is a factor that must be considered by a trial court, and may in some cases prove determinative, in deciding whether the case is triable as of right to a jury.

[11] See *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977), where this Court held that Congress could commit enforcement of statutory penal damage provisions to an administrative agency "in which facts are not found by juries," *id.* at 460, when Congress concluded that the "remedies available in courts of law were inadequate," *id.*, because a jury would be inconsistent with "speedy and expert resolutions of the issues involved." *Id.* at 461. *See also Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (judicial economy promoted by discerning use of non-mutual offensive collateral estoppel to avoid need for jury retrial of issues previously litigated in non-jury proceeding).

CONCLUSION

This case raises an issue of unusual importance for the administration of justice in the federal courts. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 10, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-8301

D.C. No. Civ. 72-242 WPC Arizona (Phoenix)

GREYHOUND COMPUTER CORPORATION,
Plaintiff/Respondent,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant/Petitioner.

ORDER

Before: HUG and PREGERSON, Circuit Judges

Upon due consideration, the court issues the following order:

(a) Pillsbury, Madison & Sutro's motion for leave to file an amicus curiae brief is granted;

(b) respondent's motion for reassignment of panel is denied; and

(c) the petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is denied.

The issue of law raised by the petition has been definitively resolved in this circuit, *In re United States Financial Securities Litigation*, slip op. at 1186 (9th Cir. December 10, 1979).

Filed Feb. 1, 1980

RICHARD H. DEANE
Clerk,
U.S. Court of Appeals

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 72-242 Phx. WPC

GREYHOUND COMPUTER CORPORATION,
Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant.

MEMORANDUM AND ORDER AND CERTIFICATE

This complex case is set February 5, 1980 [now May 1, 1980], for retrial which the Court estimates will take a minimum of three months and probably more like four if tried to a jury as demanded by plaintiff. Defendant has moved to strike the jury demand so that the case may be tried to the Court. Plaintiff opposes.

This is an antitrust case involving sophisticated, highly technical and difficult questions of economics, technology and law. It is a complex case by any definition. Trial to the Court would substantially shorten the trial and avoid the very real danger of a hung jury and a third trial or more.

While the Court believes the current status of the law requires this Court to deny the motion to strike the jury, this view is not unanimous. *See Zenith*

Radio Corp. v. Matsushita Electric Ind. Co., Ltd., [1979-2] Trade Cases (CCH), ¶ 62,753 (E.D. Pa. June 6, 1979), and ¶ 62,893 (E.D. Pa. August 21, 1979). The Court is informed that the question is currently before the Ninth Circuit. *See In re U.S. Financial Securities Litigation* M.D.L. No. 161 (9th Cir. petition for review granted August 29, 1977), *appealing* 76 F.R.D. 702 (S.D. Cal. 1977).

IT IS ORDERED:

The motion to strike the jury demand is denied for lack of authority to grant said motion.

CERTIFICATE

Pursuant to 28 U.S.C. § 1292(b), this Court certifies that the question as to whether this Court has the authority to strike the jury demand in a case such as this involves a controlling question of law as to which there is substantial ground for difference of opinion with respect to that question and immediate appeal may materially advance the ultimate termination of the litigation. *See* Judge Becker's opinion in *Zenith Radio Corp. v. Matsushita Electric Ind. Co., Ltd.*, [1979-2] Trade Cases (CCH), ¶ 62,893 (E.D. Pa.), dated August 21, 1979.

DATED November 6, 1979.

/s/ Wm. P. Copple
United States District Judge